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No. 86-1950

# In the Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIP N. ADER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner was denied his right to present his insanity defense because the district court disallowed testimony from a psychiatrist that at the time petitioner committed the crimes in question, he was unable to appreciate the wrongfulness of his acts.

2. Whether the verdict form used by the district court met the requirement of 18 U.S.C. (Supp. III) 4242(b) that a special verdict be returned in cases involving insanity pleas.

3. Whether the prosecutor's rebuttal argument prejudiced petitioner's right to a fair trial.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 7 |
| Conclusion | 15 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *United States* v. *Edwards*, No. 86-5373 (11th Cir. June 12, 1987) | 11 |
| *United States* v. *Frady*, 456 U.S. 152 (1982) | 12 |
| *United States* v. *Mest*, 789 F.2d 1069 (4th Cir. 1986), cert. denied, No. 85-7202 (Oct. 6, 1986) | 11 |
| *United States* v. *Murphy*, 768 F.2d 1518 (7th Cir. 1985), cert. denied, No. 85-924 (Feb. 24, 1986) | 14 |
| *United States* v. *Stefan*, 784 F.2d 1093 (11th Cir. 1986), cert. denied, No. 86-363 (Oct. 6, 1986) | 14 |
| *United States* v. *Young*, 470 U.S. 1 (1985) | 12, 14 |


Statutes and rule:


| | |
|---|---|
| Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 402(a), 98 Stat. 2057 | 7 |
| 18 U.S.C. (Supp. III) 20 | 7 |
| 18 U.S.C. (Supp. III) 4242(b) | 7, 11, 14 |
| 21 U.S.C. 841(a)(1) | 2 |
| 21 U.S.C. 846 | 2 |
| Fed. R. Evid.: | |
| Rule 704 | 8 |
| Rule 704(b) | 4, 6, 8 |


Miscellaneous:


| | |
|---|---|
| American Psychiatric Association Statement on the Insanity Defense (Dec. 1982) | 9 |
| S. Rep. 98-225, 98th Cong., 1st Sess. (1983) | 8, 9 |

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 816 F.2d at 673 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on April 10, 1987. The petition for a writ of certiorari was filed on June 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (Count 3), and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 4 and 16).[1] He was sentenced to consecutive terms of ten years' imprisonment on each of Counts 3 and 4, and to a concurrent two-year term of imprisonment on Count 16. In addition, he was sentenced to a six-year special parole term on Count 4 and a four-year special parole term on Count 16.

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 2-3). Petitioner was an associate of Kay Huggins, a drug trafficker who was transporting marijuana in his motor home from Louisiana to New York. Huggins's motor home developed problems, and he arranged to store 900 pounds of the marijuana for a few weeks at the North Carolina home of drug trafficker Leonard Reynolds. Reynolds and his associate Rollins Frazier, however, stole Huggins's marijuana and moved it to a mini-storage warehouse in Kingsport, Tennessee. When Huggins discovered the theft he called in petitioner and another associate known as "Jim Bob." Petitioner and Jim Bob took Reynolds to a cabin in the woods, where they gave him a polygraph examination and Jim Bob beat Reynolds. Reynolds admitted stealing the marijuana and revealed its location. After releasing Reynolds, petitioner and Huggins

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[1] Petitioner was acquitted on one count of kidnapping and one count of conspiracy to distribute marijuana.

went with Frazier to Kingsport to recover the marijuana. After retrieving the marijuana in Kingsport, petitioner and Jim Bob returned to North Carolina, where they released Frazier. Reynolds later reported the events to the police, who arrested petitioner. During a search of petitioner's car, the police found a warehouse key and receipt that led to the discovery of about 60 pounds of marijuana and assorted drug paraphernalia in a mini-storage locker.

2. Petitioner's defense at trial was that he was legally insane at the time he committed the offenses in question. His sole witness at trial other than himself was Dr. Milton Burglass, an expert in psychiatry, neurophysiology and medicine (II Tr. 416-417). Dr. Burglass testified that petitioner had smoked marijuana nearly every day since 1943 (II Tr. 461); that in the 1950's petitioner was heavily involved with heroin and other injectable narcotics or opiate drugs (*ibid.*); that in 1959, while serving a federal prison sentence, petitioner had participated in a drug research program administered by the Central Intelligence Agency that involved LSD and other controlled substances (II Tr. 444-446); that between 1959 and 1984 petitioner may have consumed more than 300 doses of LSD (II Tr. 467); and that petitioner frequently used marijuana, LSD, and cocaine in conjunction (II Tr. 465-466). Dr. Burglass testified that after using marijuana heavily, petitioner would go through a frenzied, manic state during which his judgment would be markedly impaired and he would be totally irrational (II Tr. 465). According to Dr. Burglass, when petitioner used marijuana in conjunction with LSD and cocaine, he would go into a psychotic state in which he lost touch with reality (II Tr. 466).

Dr. Burglass then testified that at the time of his arrest petitioner was suffering from substance abuse disorder, marijuana dependence, and physiological brain damage (II Tr. 473-474). One of the characteristics of the mental disease identified by Dr. Burglass was a significant compromise of "[c]onduct that involves higher level judgment and reasoning and longer term planning and evaluation of consequences down the line" (II Tr. 480).

Outside the presence of the jury, petitioner's counsel then proffered testimony by Dr. Burglass that at the time of his arrest petitioner "would * * * certainly not [have] been able to appreciate the wrongfulness of his acts" (II Tr. 482-484). The trial court disallowed this testimony on the ground that it fell within the prohibition of Fed. R. Evid. 704(b), which enjoins an expert witness from stating an opinion as to whether a defendant "did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto" (II Tr. 484-485).

In his summation to the jury, defense counsel made the following argument (IV Tr. 32 (opening and closing statements)):

> Now, understand that [petitioner's] days behind a desk like this in a court of law like this before juries are not yet over. You heard the evidence. He's got music to face in Gaston County yet. You heard, I think, during one of the government's witnesses or during opening statement, a reference to the fact that Reynolds hadn't been taken across state lines; therefore, it wasn't a federal kidnapping. That that was a state matter. So, ladies and gentlemen of the jury, there's many more miles to go, many more roads to

> travel, before [petitioner] ever sees what you and I cherish so dearly.

In response to defense counsel's argument, the prosecutor made the following statement during rebuttal summation (Pet. App. 6-7; IV Tr. 64):

> [Defense counsel] wants to bring up that there are other charges out here, I guess saying, "You let him go today, and somebody else will get him tomorrow." Well, if this jury passes on insanity today, no telling what might happen to him as to the other charges and other acts [petitioner] has committed or will commit.

Defense counsel objected to this statement. Subsequently, after the jury had been instructed on the law and excused for the day, defense counsel moved for a mistrial (III Tr. 668-669). The district court denied the motion on the ground that the prosecutor's statement was not so prejudicial as to warrant a mistrial (III Tr. 670). The next morning, the court gave the following instruction to the jury (III Tr. 670-671):

> Now, Members of the Jury, I recall that last night just at the end of the prosecutor's statements to you, that he mentioned something about the fact that—and you'll have to remember the words—to the effect that if the defendant, if you didn't find the defendant guilty, no telling what he might do, or words to that effect. Now, the only thing you're concerned with in this case is whether or not the defendant was guilty of the crimes charged. You will not consider anything about what he will do or may do in the future. It is up to you to decide whether or not the government has produced evidence beyond a reasonable doubt to satisfy you that the defendant is guilty of the crimes charged under the instructions of the Court * * *.

In its closing instructions, the district court explained that if the jurors found petitioner guilty on any of the counts, they should then determine whether petitioner was not guilty on those counts only by reason of insanity (Pet. App. 15; III Tr. 664-665, 671). The verdict form that the jury received (Pet. App. 13, 16) similarly required the jurors first to indicate as to each count whether they found petitioner guilty or not guilty. The form then read (Pet. App. 16 (emphasis in original)):

> *If* the jury has answered this Count "Guilty," then does the jury find [petitioner] "Not Guilty" only by reason of insanity? (Check *either* "YES" or "NO".) ——(YES) ——(NO)

3. The court of appeals affirmed petitioner's convictions (Pet. App. 1-14). The court found that the district court properly excluded Dr. Burglass's testimony that petitioner could not appreciate the wrongfulness of his acts. Such testimony, held the court, would have represented an opinion as to an ultimate legal issue concerning petitioner's mental state and was therefore prohibited by Fed. R. Evid. 704(b). Pet. App. 8-12. The court agreed with petitioner as to the impropriety of the prosecutor's reference during closing argument to acts petitioner might commit in the future, a statement the court viewed as directing the jury to consider whether petitioner "[would] commit future crimes if he [was] not convicted of the present charges" (Pet. App. 6-7). The court of appeals also agreed that it would have been preferable for the district court to have given an immediate curative instruction following the improper remark, rather than waiting until the following morning to do so. The court, however, rejected

petitioner's claim that the delay in giving the instruction resulted in prejudice that called for reversal, especially given the isolated nature of the prosecutor's remark. Pet. App. 7-8.

Finally, the court of appeals rejected petitioner's claim that the district court's instructions concerning the verdict, and the verdict form that was used, deviated so far from the requirements of 18 U.S.C. (Supp. III) 4242(b) as to constitute reversible error. The court expressed reservations about the verdict notation form but found that even if the district court had used a form closer to the one suggested by Section 4242(b), the jury still would have found petitioner guilty on three counts and not guilty (on the merits) on two counts. Pet. App. 13-14.

## ARGUMENT

1. Petitioner argues (Pet. 7-9) that the district court prevented him from fully presenting his insanity defense by excluding testimony from Dr. Burglass that petitioner was unable to appreciate the wrongfulness of his actions.

The Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473, Tit. II, § 402(a), 98 Stat. 2057) made two changes in the federal insanity defense. First, the Act added a new provision, now 18 U.S.C. (Supp. III) 20,[2] which defines the in-

[2] 18 U.S.C. (Supp. III) 20 provides:

*Insanity Defense*

(a) Affirmative defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or

sanity defense and provides that the defendant has the burden of proving insanity by clear and convincing evidence. Second, Congress limited the scope of expert testimony on the defendant's insanity by prohibiting experts from voicing an opinion as to whether the defendant had the mental state or condition constituting an element of the offense or of a defense. Fed. R. Evid. 704(b).[3] Under the new rule, when an insanity defense is raised, experts are not permitted to testify that the defendant's mental condition rendered him unable to appreciate the nature or wrongfulness of his acts. The experts are permitted only to present and explain their diagnoses, which can include whether or not the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect may have been. See S. Rep. 98-225, 98th Cong., 1st Sess. 225, 227, 230-231 (1983).

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the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

[3] Rule 704, Fed. R. Evid., provides:

*Opinion on ultimate issue*

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Congress recognized that under prior law, an expert witness in an insanity case could testify about so-called "ultimate" issues, such as whether the defendant was "insane" or whether he lacked the capacity to distinguish "right from wrong" (S. Rep. 98-225, *supra*, at 225). The Senate Committee stated that its purpose in limiting the scope of expert testimony in insanity cases was "to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact" (*id.* at 230). As the report explained (*id.* at 231, quoting American Psychiatric Association Statement on the Insanity Defense 18-19 (Dec. 1982)):

> [I]t is clear that psychiatrists are experts in medicine, not the law. As such, it is clear that the psychiatrist's first obligation and expertise in the courtroom is to "do psychiatry," i.e., to present medical information and opinion about the defendant's mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions. When, however, "ultimate issue" questions are formulated by the law and put to the expert witness who must then say "yea" or "nay," then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury. [Footnote omitted.] Juries thus find themselves listening to conclusory and seemingly contradictory psychiatric testimony that defendants are either "sane" or "insane" or that they do or do

> not meet the relevant legal test for insanity. This state of affairs does considerable injustice to psychiatry and, we believe, possibly to criminal defendants. * * *
>
> Psychiatrists, of course, must be permitted to testify fully about the defendant's diagnosis, mental state and motivation (in clinical and commonsense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion about which they and only they are expert. Determining whether a criminal defendant was legally insane is a matter for legal fact-finders, not for experts.

In this case, the district court allowed Dr. Burglass to testify that petitioner suffered from a mental disease and to explain the characteristics of that disease. Indeed, the district court gave Dr. Burglass great leeway in this regard (see Pet. App. 11). Dr. Burglass testified that petitioner was suffering from substance abuse disorder, marijuana dependence, and physiological damage to the brain (II Tr. 473-474). He further testified that the characteristics of this disorder were rapid fluctuation between sanity and insanity, compromised rational judgment, and an impairment of the ability to discriminate between types of conduct (II Tr. 477-480). As the court below explained (Pet. App. 11), if a characteristic of petitioner's mental disease had been an inability to appreciate the wrongfulness of one's conduct, Dr. Burglass could have testified to that medical fact. A particular individual's inability to appreciate the wrongfulness of his acts, however, is the legal definition of insanity. It was therefore proper for the district court to prevent Dr. Burglass from testifying that petitioner was unable to appreciate the wrong-

fulness of his acts. That was an issue for the jury alone to decide. See *United States* v. *Mest*, 789 F.2d 1069, 1071 (4th Cir. 1986), cert. denied, No. 85-7202 (Oct. 6, 1986) (finding improper the question: " '[D]o you have an opinion as to whether or not [the defendant] at the time of this alleged event could by virtue of his mental condition, discern the wrongfulness of his behavior and had the capacity to conform his behavior to the requirements of the law should he have so chosen?' ").[4]

2. Petitioner next contends (Pet. App. 9-11) that the verdict form used by the district court was misleading because it caused the jury to believe that even if petitioner was insane, he still could have been guilty of committing the crimes. This claim is meritless.

Where the issue of insanity is raised, the jury or the court (in the event of a bench trial) must find the defendant either (1) guilty, (2) not guilty, or (3) not guilty by reason of insanity (18 U.S.C. (Supp. III) 4242(b)). In this case the district court's instructions and verdict form did not present the three possibilities simultaneously. Instead, the court indicated that the jurors should approach the insanity question sequentially, first indicating whether they found the defendant guilty or not guilty and then, if they answered "Guilty" to any particular count, indicating whether they found petitioner not guilty only by reason of insanity.

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[4] The Eleventh Circuit recently applied this principle in *United States* v. *Edwards*, No. 86-5373 (June 12, 1987), where the court of appeals upheld the district court's decision to admit expert psychiatric testimony that discussed the usual symptoms of a mental disorder without expressing a specific conclusion about the defendant's status under the relevant legal standard.

Petitioner cannot now object to the instructions and the verdict form, because he did not object at trial. Indeed, petitioner's counsel specifically approved of the form used. Prior to closing instructions, the court inquired of the parties whether they had any objection to the verdict form the court had prepared (III Tr. 503-504). As originally prepared, the verdict form directed the jury to indicate as to each count whether they found the defendant (1) guilty; (2) not guilty; or (3) not guilty only by reason of insanity. The form directed that if the jurors answered any count "guilty," they should then indicate whether they found petitioner "not guilty" only by reason of insanity. The prosecutor objected to the form in that version because the instructions appeared repetitive and confusing. III Tr. 504. The court then suggested an alternative version of the verdict form to which petitioner now objects (III Tr. 503-504). Petitioner's counsel stated that he saw no problem with the format suggested by the court, and that in his view he "[did not think] it ma[de] any difference" (III Tr. 505-506). Having specifically acquiesced in the present form, petitioner now can challenge the district court's jury charge and the verdict form only if they constituted plain error. See, *e.g.*, *United States* v. *Young*, 470 U.S. 1, 15-16 (1985); *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Under this standard, the court of appeals correctly rejected petitioner's claim.

Although, as the court of appeals noted (Pet. App. 13), the verdict form used by the district court might conceivably have implied that "not guilty by reason of insanity" is a subspecies of "guilty," it seems unlikely that the jury was misled in that fashion or that any misconception on the jury's part could have

affected the verdict. The district court's verdict form reflected, correctly, that insanity is the only difference between a defendant who is guilty and one who is not guilty only by reason of insanity. The form also suggested that the jury should follow the permissible course of assessing the insanity question separately. Most importantly, the form made clear to the jurors that if they found petitioner to be insane at the time he committed the crimes in question, they would have to find him "not guilty by reason of insanity." Indeed, as petitioner's counsel himself remarked at the time he agreed to the changes in the verdict form suggested by the court, "[i]t would be an extraordinarily confused jury not to be able to figure [the verdict form] out, in view of the opening and anticipated closing" (III Tr. 506).

The form made it possible for the jury, as to each count, to find petitioner guilty, not guilty, or not guilty by reason of insanity. The jury found petitioner guilty on three counts and, in accordance with the court's instructions and the instructions written on the verdict form, noted that for those three counts petitioner was not found to be "not guilty only by reason of insanity." The jury also found petitioner not guilty on two counts, and, in accordance with the court's instructions and the directions on the verdict form, it did not signify whether the acquittal was based on insanity or on the merits. Those circumstances make it virtually impossible for petitioner to have been prejudiced, as he suggests (Pet. 10), by the jury's believing that it could convict him although finding that he was insane.

In sum, as the court of appeals explained, the district court's instructions and the form made no real difference in the jury's analysis of the case.

The circumstances demonstrate that if the district court had simply listed the three possible verdicts under 18 U.S.C. (Supp. III) 4242(b), "the jury would have found [petitioner] guilty on three counts and not guilty (on the merits) on two counts" (Pet. App. 14).

3. Finally, petitioner contends (Pet. 11-13) that the prosecutor's reference in closing argument to "other acts [petitioner] has committed or will commit" prejudiced petitioner's right to a fair and impartial trial. Although, as the court of appeals found (Pet. App. 7), the prosecutor's comment was "indisputably improper," it did not justify a reversal of petitioner's convictions. As this Court has recently made clear (*United States* v. *Young*, 470 U.S. at 11-12), inappropriate prosecutorial comments must be examined in the context of the trial to determine whether they constituted prejudicial error. Reversal is warranted only if the remarks in question prejudiced the defendant's substantial rights (*United States* v. *Stefan*, 784 F.2d 1093, 1100 (11th Cir. 1986), cert. denied, No. 86-363 (Oct. 6, 1986); *United States* v. *Murphy*, 768 F.2d 1518, 1534 (7th Cir. 1985), cert. denied, No. 85-924 (Feb. 24, 1986)).

No substantial rights of petitioner were prejudiced. The prosecutor's comment was isolated, and petitioner's counsel himself conceded at trial that he did not believe that the prosecutor intended to make the statement (III Tr. 669). The context of the remark suggests that the jury would not have thought it to have independent, affirmative significance. The prosecutor, in his rebuttal summation, was responding to the suggestion made in closing argument by petitioner's counsel that because there were still outstanding charges pending against petitioner, it would be a

long time before petitioner went free even if the jury acquitted him of the instant charges. The main point of the procecutor's remarks, accordingly, was the perfectly proper one that the jury should consider the case on its own merits and not consider what might happen to petitioner in other proceedings. Moreover, the court instructed the jurors the next morning that they were not to consider the prosecutor's comment concerning anything petitioner might or might not do in the future, and that their only concern should be whether petitioner was guilty of the crimes charged in this case. The court of appeals' finding that petitioner was not prejudiced by the prosecutor's comment warrants no further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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